Supreme Court, U.S.
FILED

No. 011836 JUN 13 2002

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In The
Supreme Court of the United States

JOHNNY E. WALKER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987), is to be broadly construed so that ERISA pre-empts insurance regulations with common law roots, as it is construed in the Eleventh Circuit, or whether the mandate of *Pilot Life* applies only to laws outside the insurance law, as it is construed in the Second and Third Circuits?

2. Whether traditional pre-emption jurisprudence applies to ERISA, so that Walker's cause of action under Alabama insurance law is preserved by ERISA's savings clause?

PARTIES TO THE PROCEEDING BELOW

The Petitioner in this Court, Johnny E. Walker, is an individual who is the plaintiff in the District Court and was the appellee in the Court of Appeals.

The Respondent in this Court, Provident Life and Accident Insurance Company, is a corporation engaged in the business of insurance which is defendant in the District Court and was appellant in the Court of Appeals.

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OPINIONS BELOW

The Court of Appeals opinion that the petitioner asks this Court to review is *Walker v. Provident Life and Accident Insurance Co., UnumProvident Corp. and Southern Co. Services, Inc.,*[1] 279 F.3d 1289 (11th Cir.2002), which is reproduced in the Appendix. The district court opinion granting Walker's Motion to Amend the Complaint also is reproduced in the Appendix. *Walker v. Provident Life and Accident Insurance Co.,* Case # CV-00-AR-2253-S (N.D.Ala., February 6, 2001).

JURISDICTIONAL BASIS

This Petition asks the Court to review the January 23, 2002, opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals reversed the decision of the district court, which had permitted Walker to amend his complaint to add a claim under the State law of Alabama. The Court of Appeals denied Walker's petition for rehearing on March 15, 2002. The Eleventh Circuit issued its judgment as a mandate on March 26, 2002.

If the Court grants the Petition, it will have jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] UnumProvident Corp. was dismissed from the case on or about September 26, 2000. Southern Company Services, Inc., was dismissed from the case on or about November 16, 2000. They are no longer parties to the case and are not involved in this Petition.

STATUTE INVOLVED IN THE CASE

The so-called "savings clause" in ERISA, 29 U.S.C. § 1144(b)(2)(A) (excerpt):

> "[N]othing in this sub-chapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ."

STATEMENT OF THE CASE

Walker is an ERISA participant. He brought an ERISA claim in federal district court against an insurance company, seeking to remedy a denial of disability benefits. He amended his federal complaint to add a cause of action for bad faith under Alabama insurance law.

Eleventh Circuit law holds that ERISA pre-empts such a cause of action, based upon the Supreme Court's opinion in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987). The district court granted leave to amend anyhow, based upon subsequent Supreme Court decisions. The district court relied upon the plain meaning of ERISA and the opinion of the Supreme Court in *Unum Life Ins. Co. of America v. Ward,* 119 S.Ct. 1380 (1999).

Provident brought an interlocutory appeal of the district court's decision granting leave to amend the complaint. The Eleventh Circuit reversed, adhering to its position prior to *Ward,* and relying upon a broad reading of *Pilot Life.*

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER *PILOT LIFE INS. CO. v. DEDEAUX* REQUIRES A DEPARTURE FROM TRADITIONAL PRE-EMPTION JURISPRUDENCE.

A. Traditional Pre-emption Jurisprudence Emphasizes the Intent of Congress as Expressed in the Statute.

The Eleventh Circuit construed this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987), to require a broad interpretation of ERISA pre-emption. Under the Eleventh Circuit's construction, ERISA pre-empts any State law with common law roots, even though the law is associated exclusively with the insurance industry. That broad construction of *Pilot Life* is at odds with this Court's traditional pre-emption jurisprudence.

Traditional pre-emption jurisprudence confines the reach of statutory federal pre-emption to the explicit intent of Congress. In pre-emption analysis, the "ultimate touchstone" is the purpose of Congress. *Metropolitan Life, supra,* 105 S.Ct. at 2393; *Malone v. White Motor Corp.,* 98 S.Ct. 1185, 1190 (1978); *Retail Clerks v. Schermerhorn,* 84 S.Ct. 219, 222 (1963). The courts' task in deciding pre-emption cases "is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Air Lines, Inc.,* 103 S.Ct. 2890, 2899 (1983).

Prior to *Pilot Life,* for example, the Court held in a 1985 ERISA case that a Massachusetts statute requiring minimum mental health care benefits was preserved. *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380 (1985). The Court held, "We therefore decline to impose

any limitation on the savings clause beyond those Congress imposed in the clause itself." *Id.*, 105 S.Ct. at 2392-93. The Court found that ERISA's language, structure and legislative history called for preservation of state insurance laws under the savings clause. The *Metropolitan Life* opinion explained that state laws which regulate insurance were saved under ERISA, whether or not they were related to ERISA's substantive provisions. *Id.*, 105 S.Ct. at 2393.

The Eleventh Circuit panel in the current case agreed that the intent of Congress is the key question. ("Our inquiry begins with the intent of Congress.") Nonetheless, the ruling below would deprive the state legislatures of their authority to regulate the business of insurance, whenever the regulation in question had common law roots. This is contrary to the intent of Congress as first expressed in McCarran-Ferguson in 1945 and then re-emphasized in ERISA.

McCarran-Ferguson is a states' rights statute which provides, in relevant part, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Quoted in *Pilot Life*, 107 S.Ct. at 1553, n.2; *see U.S. Department of Treasury v. Fabe*, 113 S.Ct. 2202, 2207 (1993) (referring to state regulation as the "mission" of McCarran-Ferguson).[2] Prior to the

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[2] In *Fabe*, the five-Justice majority ruled for the broadest construction of McCarran-Ferguson, so as to include within its scope laws associated with bankruptcy priorities. The four dissenters would have limited the scope of McCarran-Ferguson to statutes "designed to protect or regulate the relationship between an insurance company and its policyholders, whether this end is accomplished in a direct or indirect

(Continued on following page)

passage of McCarran-Ferguson, the Supreme Court held that insurance was interstate commerce. *U.S. v. South-East Underwriters Ass'n*, 64 S.Ct. 1162 (1944). Within a year, Congress enacted McCarran-Ferguson to re-establish that continued state regulation of insurance was in the public interest. *Fabe, id.* Thus, there is a "strong federal policy" which defers to the states for regulation of the insurance industry. *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir.1995).

When ERISA came along, Congress re-stated its intent to preserve the primacy of state regulation over insurance. The point of the ERISA savings clause was to continue the same purpose embodied in McCarran-Ferguson itself:

> The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance," appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States.

Metropolitan Life Ins. Co. v. Massachusetts, 105 S.Ct. 2380, 2391 n.21 (1985).

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way. . . ." *Fabe*, 113 S.Ct. at 2213. The Alabama cause of action at issue in the current case would satisfy all nine Justices. It regulates insurance even under the more stringent test proposed by the dissenters in *Fabe*.

B. The Supreme Court *Pilot Life* Decision, Which Discussed ERISA Pre-Emption in General.

In 1987 the Court was "again called on to interpret" the reach of ERISA pre-emption in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549, 1553 (1987). *Pilot Life* precluded an ERISA participant from bringing a Mississippi state law tort claim. The primary foundation for that result undisputedly is consistent with traditional pre-emption jurisprudence, because it tracks the limitation found in the savings clause itself. The dispositive finding was, "Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under the Mississippi law." 107 S.Ct. at 1554. That finding was sufficient to resolve the case, but the *Pilot Life* opinion went further.

In contrast to *Metropolitan Life,* which "decline[d] to impose any limitation on the savings clause beyond those Congress imposed in the clause itself," *Metropolitan Life, supra,* 105 S.Ct. at 2392-93, the *Pilot Life* decision imposed two additional limitations.[3] First, it held, "Mississippi's law of bad faith, even if associated with the insurance industry, has developed from general principles of tort and contract law available in any breach of contract case." *Pilot Life,* 107 S.Ct. at 1555. Second, the Court held in *Pilot Life,* " . . . ERISA's civil enforcement remedies were

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[3] *Pilot Life* distinguished the *Metropolitan Life* case because the mandated benefits law at issue in *Metropolitan Life* "define[d] the terms of the relationship between the insurer and the insured," *Pilot Life,* 107 S.Ct. at 1555, and because *Metropolitan Life* "involve[d] a state law that conflicted with a substantive provision of ERISA." *Pilot Life* held that *Metropolitan Life* was not of general authority, and that its reach only included the particular kind of law before the Court.

intended to be exclusive," 107 S.Ct. at 1556-57, because the legislative history indicated that the pre-emptive force of ERISA was "modeled after § 301 of the LMRA." *Id.*, 107 S.Ct. at 1557.

C. The Expansive View of *Pilot Life* in the Eleventh and Ninth Circuits.

This departure from traditional pre-emption analysis sparked a conflict in the circuits in applying the *Pilot Life* decision. In the current case, the Eleventh Circuit relied on *Pilot Life* to preclude Alabama state insurance law claims, as it had held previously.[4]

The Alabama statute is Ala. Code § 27-12-14. It appears within the "Insurance" title of the Code and the cause of action appears in the "Insurance" chapter of the Alabama Pattern Jury Instructions. *See Gilbert v. Alta Health & Life Insurance Co.*, 122 F.Supp. 2d 1267, 1272 (N.D.Ala.2000), *reversed,* 276 F.3d 1292 (11th Cir.2001). The Eleventh Circuit held that the Alabama cause of action does not regulate insurance, even though the purpose of Chapter 12 of the Insurance Code is precisely to regulate insurance, according to the Alabama legislature:

> The purpose of this chapter is to regulate trade practices in the business of insurance in accordance

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[4] *Belasco v. W.K.P. Wilson & Sons*, 833 F.2d 277 (11th Cir.1987); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir.1989); *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562 (11th Cir.1994); *Gilbert v. Alta Health and Life Insurance Co.*, 276 F.3d 1292 (11th Cir.2001).

> with the intent of congress as expressed in the Insurance Regulation Act. . . .

Trade Practices Law, Alabama Insurance Code § 27-12-1.

According to the Eleventh Circuit, *Pilot Life* depleted the savings clause, so that state laws are pre-empted if they have common law roots – even including those codified in the Insurance Code and which apply only to insurers. Citing *Pilot Life,* the Eleventh Circuit held in the current case that the Alabama insurance law does not regulate insurance under the common sense test. The Eleventh Circuit stated, "The fact that the Alabama tort has been codified to apply specifically to the insurance industry does not erase the presence of common law roots."[5] The Ninth Circuit reached a similar conclusion in *Kanne v. Connecticut General Life Ins. Co.,* 867 F.2d 489 (9th Cir.1989) ("In *Pilot Life,* the Supreme Court held that state common law causes of action arising from the improper processing of a claim are preempted by federal law.").

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[5] The Eleventh Circuit also held that the "common-sense view does not support application of the savings clause" to the Alabama cause of action. The Court of Appeals' view of common sense carries great weight, as the opinion in *Ward* directs. *Ward*, 119 S.Ct. at 1386 (holding that the common sense of the Court of Appeals is entitled to deference, because, "[W]e do not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law."). But the Eleventh Circuit has spoken with two different voices on the question of common sense. In *Anschultz v. Connecticut General Life Ins. Co.*, 850 F.2d 1467, 1468-69 (11th Cir.1988), the Eleventh Circuit took the view opposite from the current case and held that common sense indicates that a statute which is codified in the Insurance Code "regulates insurance."

D. The Contrary View of the Second and Third Circuits.

The Mississippi statute which was before the Court in *Pilot Life* was not an insurance regulation. It applied generally, in that it reached defendants other than insurance companies. In that light, an alternate reasonable interpretation of *Pilot Life* was adopted by the Third Circuit and then the Second Circuit, both of which held that the mandate of *Pilot Life* was limited to laws of general applicability. According to those two Courts of Appeal, *Pilot Life* had no effect on state insurance laws.

The Third Circuit case which anticipated *Ward* was *Pas v. Travelers Ins. Co.*, 7 F.3d 349 (3rd Cir.1993). *Pas* held that a state law providing a remedy for discrimination in insurance contracts against certain handicapped persons was not pre-empted by ERISA. The Third Circuit applied the analytical framework set out in *Pilot Life,* but held that the New Jersey statute in question "is distinguishable from any generic unfair trade practice statute." 7 F.3d at 356. There was no discussion in the *Pas* opinion as to whether the New Jersey statute had common law roots.

The Second Circuit case which anticipated *Ward* was *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2nd Cir.1995). The Second Circuit interpreted *Pilot Life* as limited to its facts, so that the holding of *Pilot Life* applied only to laws which were not insurance laws. *Id.*, 50 F.3d at 150 (holding that *Pilot Life* "involve[s] statutes that, while impacting on the insurance industry, are based upon general contract and tort principles."). In *Franklin H. Williams* the Second Circuit considered a claim for violation of a New York law requiring an insurer

to pay interest for life insurance benefits beginning at the date of death. The insurer urged that the New York law was unprotected by the savings clause, on two grounds: (i) it did not regulate insurance; and (ii) it was inconsistent with ERISA's exclusive enforcement scheme. The Second Circuit rejected both arguments. Relying upon *Metropolitan Life,* the Second Circuit applied a "common sense test" to the state law, and said that "to state the obvious, [the state law] regulates the terms of certain insurance contracts, and so seems to be saved from preemption by the savings clause. . . . " *Id.,* 50 F.3d at 149.

E. The Supreme Court Has Already Resolved the Conflict By Confirming the View Taken by the Second and Third Circuits.

The interpretation in the Second and Third Circuits has been vindicated by this Court's decisions beginning in 1993 and culminating in *Unum Life Ins. Co. of America v. Ward,* 119 S.Ct. 1380 (1999). In *Ward*, the Court stressed the application of the common sense test (119 S.Ct. at 1386-87):

> The [California] rule thus appears to satisfy the common sense view as a regulation that hones in on the insurance industry and does "not just have an impact on that industry."

Ward, 119 U.S. at 1386-87 (citing *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987)).

Ward's action against UNUM claimed that the denial of benefits was improper because of the California notice-prejudice rule, a judicially-created doctrine. The notice-prejudice rule provides that an insurer may not deny an untimely insurance claim unless it can establish that it

suffered actual prejudice from the late notice. The issues in *Ward* essentially mirror the issues in the Second Circuit case *Franklin H. Williams*. Just as Travelers had claimed in the Second Circuit case, in the *Ward* case, UNUM claimed: (i) the rule did not fall within ERISA's savings clause because it was not a law regulating insurance; and (ii) even if the notice-prejudice rule fell within the savings clause, it provided a remedy which was in conflict with ERISA's civil enforcement scheme. In a unanimous opinion written by Justice Ginsburg, the Supreme Court rejected UNUM's claims.

The Supreme Court's view of its *Pilot Life* decision is clear from the discussion in *Ward* which directs that *Pilot Life* must be viewed in context, and the context was a "law not specifically directed to the insurance industry." *Ward,* 119 S.Ct. at 1390 n.7. On that basis, the opinion in *Ward* distinguished *Pilot Life*: "[*Pilot Life*] concerned Mississippi common law creating a cause of action for bad faith breach of contract, law not specifically directed to the insurance industry and therefore not saved from ERISA pre-emption." *Id. Ward* confirms that the Second and Third Circuits correctly interpreted the intent of Congress, which is the interpretation of *Pilot Life* upon which Walker relies in this appeal.

Under current Supreme Court holdings, the reach of ERISA pre-emption is subject to traditional pre-emption analysis. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 117 S.Ct. 832, 843 (1997) (Scalia, J., *concurring*) ("I think it accurately describes our current ERISA jurisprudence to say that we apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption."); *Egelhoff v. Egelhoff,* 121 S.Ct. 1322, 1330-31 (2001) (Scalia, J., *concurring*) ("I persist in

the view that we can bring some coherence to this area, and can give the statute both a plausible and precise content, only by interpreting the 'relate to' clause as a reference to our ordinary pre-emption jurisprudence."). ERISA opinions from 1993 to the present confirm this. Looking back from the vantage point of 1997, Justice Scalia put it this way:

> Our new approach to ERISA pre-emption is set forth in *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 99 (1993): "we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis."

Dillingham Construction, supra, 117 S.Ct. at 843 (Scalia, J., *concurring*).

None of the justices have expressed disagreement with Justice Scalia on this point, and three justices have explicitly endorsed his view. Justice Ginsburg joined in both of the quoted concurrences (*Dillingham Construction* and *Egelhoff*). Justices Breyer and Stevens dissented from the result in *Egelhoff*, which held that a Washington statute in the Code of Probate was pre-empted. At the same time, Justices Breyer and Stevens expressed agreement with Justice Scalia's description that traditional pre-emption principles constitute the current mode of ERISA analysis in the Supreme Court. Justice Breyer's dissent set out the recent case law:

> Like Justice Scalia, I believe that we should apply normal conflict pre-emption and field pre-emption principles where, as here, a state statute covers ERISA and non-ERISA documents alike. . . . Our more recent ERISA cases are consistent

> with this approach. See *DeBuono v. NYSA-ILA Medical and Clinical Services Fund,* 520 U.S. 806, 812-13 (1997) (rejecting literal interpretation of ERISA's pre-emption clause); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 334 (1997) (narrowly interpreting the clause); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656 (1995) ("go[ing] beyond the unhelpful text [of the clause] and the frustrating difficulty of defining its key term, and look[ing] instead to the objectives of the ERISA statute as a guide"). See also *Boggs v. Boggs,* 520 U.S. 833, 841 (1997) (relying on conflict pre-emption principles instead of ERISA's pre-emption clause).

Egelhoff, 121 S.Ct. at 1331 (Breyer, J. *dissenting*).

Traditional pre-emption jurisprudence calls for reversal of the Eleventh Circuit law. The Alabama cause of action hones in on the insurance industry under *Ward* and thus regulates insurance under ERISA.

II. CONGRESS DID NOT INTEND TO "SUPER PRE-EMPT" THE FIELD OF REGULATION OF INSURANCE.

The Eleventh Circuit below disallowed Walker's State law cause of action, relying primarily upon the broad construction of *Pilot Life* which would deny the protection of the savings clause to insurance statutes with common law origins. A second potential ground for pre-emption is also at issue in the present Petition. It is the possibility of implied "field pre-emption."

"Field pre-emption" or "super pre-emption" are terms for the exclusive occupation of a given regulatory turf, based upon the Supremacy Clause in Article VI of the Constitution. *See Silkwood v. Kerr-McGee Corp.,* 104 S.Ct. 615, 621 (1984) (citations omitted):

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Thus, in exercising its broad supremacy powers, Congress can go beyond nullification of conflicting State laws; according to this possible interpretation of ERISA, even remedies which are compatible with or supplementary to ERISA are pre-empted.

The principles of federalism and state sovereignty require that the Courts invoke field pre-emption only where Congressional intent is manifest. Consideration of pre-emption issues starts "with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 67 S.Ct. 1147, 1152 (1947). Field pre-emption is inferred by the courts only when Congress has regulated the area comprehensively or when the subject is peculiarly within the federal domain. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 105 S.Ct. 2371 (1985) (applying field pre-emption either where Congress "left no

room" for state regulation or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"); *see Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 103 S.Ct. 1713, 1722 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul,* 83 S.Ct. 1210, 1217-18 (1963); *Rice, supra*. Furthermore, "The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously." *Cippolone v. Liggett Group, Inc.,* 112 S.Ct. 2608, 2626 (1992) (Blackmun, J., *concurring*).

No intent to pre-empt state insurance law remedies is explicit in ERISA; however, in *Pilot Life* the Court found indications of Congressional intent in the legislative history. The Court held in *Pilot Life,* " . . . ERISA's civil enforcement remedies were intended to be exclusive," 107 S.Ct. at 1556-57, because the legislative history indicated that the pre-emptive force of ERISA was "modeled after § 301 of the LMRA." *Id.,* 107 S.Ct. at 1557. There is reference to the Labor Management Relations Act ("LMRA") in the legislative history of ERISA. *Pilot Life* endorsed this comparison between ERISA and the LMRA (107 S.Ct. at 1555). The LMRA is an example of broad pre-emption of an entire field of law, precluding all state law remedies which depend upon an interpretation of a Collective Bargaining Agreement. *Textile Workers v. Lincoln Mills,* 77 S.Ct. 912 (1957).

Although the *Pilot Life* opinion recites that it reached a "resolution" of this exclusivity question, 107 S.Ct. at 1558, the finality of this "resolution" is repudiated in *Ward.* In *Ward,* the Court noted that it need not decide the

issue of whether state insurance law remedies were pre-empted, because in *Ward* the plaintiff was proceeding solely under ERISA. "The notice-prejudice rule supplied the relevant rule of decision for this § 502(a) suit. The case therefore does not raise the question whether § 502(a) provides the sole launching ground for an ERISA enforcement action." *Id.,* 119 S.Ct. at 1391. *Ward* characterizes *Pilot Life* as having "discussed" rather than resolved the question. *Ward, supra,* 119 S.Ct. 1390 n.7. The question thus remains open as to whether ERISA implicitly pre-empts the entire field of employee benefits so as to preclude *all* state law remedies, even those found in the state's insurance regulations. *Ward, supra,* 119 S.Ct. at 1390-91 & n.7.

Although field pre-emption, or so-called "super pre-emption," is an open question, Provident is swimming against the tide in trying to convince the Court that Congress implicitly intended to override traditional state regulation of insurance. Consideration of pre-emption issues starts with the assumption that the historic powers of the States are not superseded unless that is the clear and manifest purpose of Congress. Here the Court must begin with the premise that in ERISA Congress clearly manifested an intent to *preserve* (rather than supersede) traditional state regulation of insurance.

State Insurance regulation is compatible with ERISA. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank,* 114 S.Ct. 517, 523 (1993) ("[W]e hold ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated. . . . "); *see FMC Corp. v. Holliday,* 498 U.S. 52, 64 (1990) ("If a plan is insured, a State may regulate it

indirectly through regulation of its insurer and its insurer's insurance contracts."). Under traditional pre-emption principles, field pre-emption is disfavored and requires a deeper and more detailed analysis of Congressional intent. *Hillsborough County, supra,* 105 S.Ct. at 2376 ("Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.").

The outcome of traditional field pre-emption analysis is that the Alabama insurance law cause of action is not pre-empted, based upon three factors: (i) the purposes of ERISA; (ii) the point that insurance law is traditionally an area where Congress defers to state sovereignty; and (iii) the lack of an adequate remedial scheme in the employee benefits portion of ERISA.

The Court should decline to infer a Congressional intent to super pre-empt state insurance law, based upon the policy behind ERISA. The purpose of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans. 29 U.S.C. § 1001(b) (1994).

Uniformity is another important purpose of ERISA. Congress intended to provide uniformity of enforcement in order to protect employers from the necessity of complying with rules varying from state to state. The purpose of uniformity applies to employers, but not insurers. The Congress' concern was that employers as administrators "would not have to administer their plans differently in each state in which they had employees." *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211, 2217 (1987) ("It

is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities."). The same concern does not apply to insurance companies, which are already subject to the varying rules of the fifty states. The result in the Court below would give primacy to protection for insurance companies, as if the protection of participants and beneficiaries was a secondary aim, subordinate to the goal of uniform enforcement.

Congress attached a great deal of importance to the distinction between self-insured plans and those plans covered by insurance. The so-called "deemer clause" is one expression of this distinction. The deemer clause provides in relevant part that no employee benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts. . . . " 29 U.S.C. § 1144(b)(2)(B). Hence, employers are excused from compliance with State regulations; insurance companies are not. The deemer clause would serve no purpose otherwise.

It regularly falls to the courts to resolve the competing claims for attention among such worthy goals as uniformity, protection of participants and preservation of traditional state sovereignty. While it is true that Congress wanted to promote nationwide uniformity, at the same time Congress intended not to displace state insurance laws which protect the interests of employees and their beneficiaries. *Metropolitan Life, supra,* 105 S.Ct. at 2393 ("[D]isuniformities, however, are the inevitable result of the congressional decision to 'save' local insurance regulation. Arguments as to the wisdom of these policy choices

must be directed at Congress."), *quoted in Ward,* 119 S.Ct. at 1390 n.6.

Regulation of employee benefits by the states is compatible with ERISA. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank,* 114 S.Ct. 517, 523 (1993) ("[W]e hold ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated . . . . "); *see also Humana, Inc. v. Forsyth,* 119 S.Ct. 710 (1999) (holding Nevada State Insurance Law remedies complement and co-exist with federal RICO remedies.).

The finding in *Pilot Life* that Congress intended its remedial section to be exclusive is based on a comparison to the LMRA. It stems from a sentence in the Conference Report which reads, "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."

The sentence in the Conference Report which makes the comparison to LMRA will not nearly bear the great interpretive weight which *Pilot Life* suggested it would carry. Insurance is traditionally subject to State regulation. By contrast, labor/management relations necessarily is an area of federal rather than State sovereignty. The major federal concerns are preserving industrial peace and maintaining the flow of interstate commerce. ERISA rights are of course significant, but violations of ERISA do not have the cross-border implications which are the stuff of labor unrest. *See generally Groves v. Ring Screw Works, Ferndale Fasteners Div.,* 111 S.Ct. 498 (1990). Nothing in

ERISA compares with labor strikes with their significant interruption of interstate commerce and their attendant potential for violence.

For that reason the LMRA dominates the entire field of labor/management relations. The enforcement provision of the LMRA (§ 301) thus differs from § 502 of ERISA in that it is part of a federal scheme which endeavors to ensure industrial peace. Uniformity is a secondary purpose of ERISA, but it is basic to LMRA. In *Lingle v. Norge Division of Magic Chef, Inc.,* 108 S.Ct. 1877 (1988), the Court held that the primary purpose of the LMRA was to "ensure uniform interpretation of Collective Bargaining Agreements to promote peaceable consistent resolution of labor/management disputes." The Court stated:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Id., 108 S.Ct. at 1880.

The necessity for uniform interpretation was the basis of Congress' intent that the LMRA provide exclusive remedies. *See Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California,* 103 S.Ct. 2840, 2854 n.28 (1983) ("§ 301(a) of the LMRA applies to *all* [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry effecting commerce . . . or between any such labor organizations.") (emphasis added, internal quotation marks omitted).

The Court should decline to infer a congressional intent to super pre-empt state insurance law, because insurance law traditionally is not a federal area of regulation. In areas of traditional State regulation, the presumption is against pre-emption. *See Egelhoff v. Egelhoff,* 121 S.Ct. 1322 (2001) (Breyer, J. *dissenting*):

> The more serious pre-emption question is whether this state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In answering that question, we must remember that petitioner has to overcome a strong presumption *against* pre-emption. That is because the Washington statute governs family property law – a field of traditional state regulation, where courts will not find federal pre-emption unless such was the clear and manifest purpose of Congress, or the state statute does major damage to clear and substantial federal interests.

121 S.Ct. at 1332-33 (Breyer, J. *dissenting*) (citations and internal quotation marks omitted).

The Court should decline to infer a congressional intent to super pre-empt state insurance law, because ERISA does not specify a comprehensive enforcement mechanism. The Supreme Court held in *Hillsborough County, supra,* 105 S.Ct. at 2371, that field pre-emption might apply where Congress "left no room" for state regulation. In ERISA Congress left plenty of "room" for State remedies. The rules which limit the remedies available to ERISA participants and beneficiaries emerged from judicial interpretation of Congress' silence. Congress did not say yay or nay to extra-contractual damages, jury trials, or the arbitrary and capricious standard of proof. They were all matters of judicial interpretation.

In light of the Congressional purpose of protecting participants and beneficiaries, the logical conclusion is that Congress purposely left out the specifics of the damages so that the States could act as they see fit. There is no evidence that Congress wished to nullify the long-standing tradition of remedies in court to protect against aggravated or egregious violations. When Congress promulgates employment law legislation, it ordinarily provides such remedies. In the Fair Labor Standards Act and the Equal Pay Act, the enforcement provision in 29 U.S.C. § 216(b) authorizes juries to award the amount of unpaid minimum or overtime wages, or the amount of back pay as appropriate, plus an additional equal amount for liquidated damages. (Liquidated damages are subject to a good faith exception, 29 U.S.C. § 260.) Section 216(e) sets out specific civil penalties for child labor violations.

Remedies in ERISA are tailored to protect accumulated pension benefits, but ERISA is silent with regard to any meaningful regulation of insurers. Instead, it saves to the states the continuing responsibility to regulate insurers. It makes little sense for Congress to have specifically saved state insurance laws and then strip the states of their ability to enforce their laws. To affirm the decision below would be to find that Congress implicitly supplanted an entire domain of traditional state regulation, without making any provision for remedying aggravated or egregious violations.

CONCLUSION

This Court should grant the writ and reverse the judgment below. Petitioner's cause of action under Alabama insurance law is not pre-empted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12100

D.C. Docket No. 00-02253-CV-AR-S

JOHNNY E. WALKER,

Plaintiff-Appellee,

versus

SOUTHERN COMPANY SERVICES, INC.,
UNUMPROVIDENT CORPORATION,

Defendants,

PROVIDENT LIFE & ACCIDENT INSURANCE CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(January 23, 2002)

Before TJOFLAT and BIRCH, Circuit Judges, and GOLDBERG*, Judge.

BIRCH, Circuit Judge:

In this case, we decide whether the Supreme Court's decision in *UNUM Life Ins. Co. of America v. Ward,* 526

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* Honorable Richard W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

U.S. 358, 119 S. Ct. 1380 (1999) alters the application of the savings clause of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(b)(2)(A), such that the tort of bad faith under Alabama law is now saved from preemption. At the district court, the plaintiff Walker sought to amend his complaint to add the state law tort claim. After the district court granted leave to amend, the defendant Provident Life Insurance Company ("Provident") brought this interlocutory appeal. We conclude that *Ward* did not change ERISA's preemptive effect on the Alabama law of bad faith, and REVERSE the decision of the district court.[1]

I. BACKGROUND

Few facts are needed to resolve this appeal. Walker brought an ERISA plan enforcement action pursuant to 29 U.S.C. § 1132(a)(1)(B), alleging that Provident failed to pay disability benefits due to him under the long term disability plan of Southern Company Services, Incorporated. After filing his complaint, Walker sought leave to add the claim that Provident's unwillingness to disperse benefits violated Alabama Code § 27-12-24, which creates liability for bad faith refusal to pay insurance claims. The district court granted Walker's motion. Provident then petitioned for interlocutory review, which was granted by our court.

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[1] While Walker's appeal was pending, we decided *Gilbert v. Alta Health & Life Ins. Co.*, in which we concluded that the Alabama law of bad faith is not saved from ERISA preemption. *See* ___ F.3d ___ (11th Cir. Dec. 27, 2001).

II. DISCUSSION

We review the district court's decision to grant leave to amend the pleadings for abuse of discretion. *Butts v. County of Volusia,* 222 F.3d 891, 892 n.2 (11th Cir. 2000). When reviewing the district court's ERISA preemption analysis, we use a *de novo* standard. *Hall v. Blue Cross/Blue Shield of Ala.,* 134 F.3d 1063, 1064-65 (11th Cir. 1998).

Our preemption analysis begins with legislative intent. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977). Congress passed ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). In an attempt to ensure the scheme's comprehensiveness, Congress included a preemption provision: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).

The effect of ERISA's preemption provision is tempered by a savings clause: state laws which "regulate insurance" are not preempted. 29 U.S.C. § 1144(b)(2)(A). This clause provides that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." In this appeal, neither party disputes that the Alabama law "relates to" employee benefit plans; the question is whether the Alabama law "regulates insurance." The question, in other words, is the interpretation of the savings clause.

To determine whether a state law regulates insurance under the savings clause, we follow a two part analysis developed by the Supreme Court. First, we ask whether common sense suggests that the law regulates insurance. *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740, 105 S. Ct. 2380, 2389 (1985). Under this inquiry, a law must be specifically directed toward the insurance industry; mere impact on the industry is insufficient. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 50, 107 S. Ct. 1549, 1554 (1987). Second, we consider whether the state law governs the "business of insurance" as defined by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq. Metropolitan Life,* 471 U.S. at 742-43, 105 S. Ct. at 2390-91. The McCarran-Ferguson Act definition is a function of three inquiries: "*first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S. Ct. 3002, 3009 (1982).

The Supreme Court applied the *Metropolitan Life* framework to the state law of bad faith in Mississippi, and found that the savings clause did not apply. *Dedeaux,* 481 U.S. at 57, 107 S. Ct. at 1558. Our court applied the reasoning of *Dedeaux* to the Alabama law of bad faith in 1987. *Belasco v. W.K.P. Wilson & Sons, Inc.,* 833 F.2d 277 (11th Cir. 1987). We determined that

> the Alabama law of bad faith appears to us to have the same roots "in the general principles of . . . tort and contract law" as was the case in *Dedeaux.* The other factors considered by the Supreme Court in its analysis of the saving clause

> in *Dedeaux* are not disputed by plaintiffs and would apply to this case in the same manner as they applied to the facts in *Dedeaux*. We conclude that the saving clause does not apply in this case.

Id. at 281 (internal citations omitted); *accord Amos v. Blue Cross-Blue Shield of Ala.*, 868 F.2d 430 (11th Cir. 1989) (per curiam).

Provident argues that *Belasco* and *Amos* dispose of this appeal. The district court concluded otherwise, interpreting two footnotes from the Supreme Court's *Ward* decision to alter savings clause analysis such that the Alabama tort of bad faith is no longer preempted.[2] In footnote six, the *Ward* Court acknowledged that "applying the States' varying insurance regulations creates disuniformities" for national plans in local markets, but that "'[s]uch disuniformities . . . are the inevitable result of the congressional decision to "save" local insurance regulation.'" *Ward,* 526 U.S. at 376 n.6, 119 S. Ct. at 1390 (quoting *Metropolitan Life,* 471 U.S. at 747, 105 S. Ct. at 2393). In the following footnote, the *Ward* Court remarked that the Mississippi law at issue in *Dedeaux* was "not specifically directed to the insurance industry and therefore not saved from ERISA preemption." *Ward,* 526 U.S. at 377 n.7, 119 S. Ct. at 1390. The district court, whose position is championed for obvious reasons by Walker, reasons that these two footnotes replace the *Metropolitan*

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[2] The order granting Walker leave to amend is explicitly based on the principles announced in *Hill v. Blue Cross Blue Shield of Alabama,* an earlier decision by the same district judge which addresses ERISA's preemptive effect on the Alabama law of bad faith after *Ward. See Hill,* 117 F. Supp.2d 1209, 1211-12 (N.D. Ala. 2000).

Life preemption test with a single inquiry: is the law at issue specifically directed to the insurance industry?[4]

Our *de novo* review reveals that the district court's analysis is flawed. In footnote six, the *Ward* Court acknowledges and sanctions the fact that laws falling under the protection of the savings clause will not be uniform across state lines. Footnote six does not address the analytical steps a court must take to reach a savings clause decision: instead, the footnote comments only on the *results* of such a decision. The calculus of *Metropolitan Life* is untouched.

Like footnote six, *Ward*'s footnote seven provides commentary on preexisting law. As the Court held in *Dedeaux,* the common sense inquiry is satisfied only in limited circumstances: "a law must not just have an impact on the insurance industry, but must be *specifically directed toward that industry." Dedeaux,* 481 U.S. at 50, 107 S. Ct. at 1554 (emphasis added). *Ward*'s footnote seven uses identical language, commenting that Mississippi's tort of bad faith cannot survive preemption because it is *"not specifically directed to the insurance industry." Ward,* 526 at 377 n.7, 119 S. Ct. at 1390 (emphasis added). Footnote seven merely comments on the fact that the Mississippi law failed the common sense test; it does not create a new standard for analyzing ERISA's savings clause.

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[4] "To this court, the only question that remains is whether Alabama's cause of action for bad faith is limited to the insurance industry." *Hill,* 117 F. Supp.2d at 1212. The *Metropolitan Life* standard was not applied.

Application of the *Metropolitan Life* standard reveals that the Alabama tort of bad faith is preempted. To begin with, the tort fails the common sense test. The Alabama law, as we have earlier held, is rooted in the common law of contract and tort. *Belasco,* 833 F.2d at 281. Such common law roots, according to the Supreme Court, make it less likely that the law regulates insurance under the common sense inquiry. *Dedeaux,* 481 U.S. at 50, 107 S. Ct. at 1554. The fact that the Alabama tort has been codified to apply specifically to the insurance industry does not erase the presence of common law roots.

Next we decide whether Alabama's tort of bad faith regulates "the business of insurance" as defined by the McCarran-Ferguson Act. With respect to the first inquiry, whether the law spreads or transfers the policyholder's risk, the Supreme Court's answer is "no." In *Dedeaux,* the Court held that the correlative tort under Mississippi law failed to achieve this goal. 481 U.S. at 50, 107 S. Ct. at 1554. Indeed, Walker does not even offer an argument on this point.

The second inquiry under the McCarran-Ferguson Act is whether the law is "an integral part of the policy relationship between the insurer and the insured." *Pireno,* 458 U.S. at 129, 102 S. Ct. at 3009. While it is unclear exactly what this factor requires, the *Ward* Court determined that it is certainly satisfied when the law at issue "changes the bargain between insurer and insured." 526 U.S. at 374, 119 S. Ct. at 1389-90. In *Ward,* the notice-prejudice rule created a new contract term: the insurer must prove actual prejudice before refusing to pay a late claim. *Id.* The tort of bad faith, however, changes no contract term because the obligation of good faith is implied in every contract under Alabama law. Ala. Code

§ 7-1-203. As the Supreme Court observed, the effect of the law of bad faith is not on the terms of the contract but on the nature of the remedy: the tort allows a plaintiff to recover punitive damages. *Dedeaux,* 481 U.S. at 51, 107 S. Ct. at 1555. As such, the tort "is no more 'integral' to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State." *Id.*

The third inquiry under McCarran-Ferguson is whether the law applies only within the insurance industry. While only applicable to insurance cases, *American Cast Iron Pipe Co. v. Williams,* 591 So.2d 854, 857 (Ala. 1991), the statute is a product of basic common law principles. *Belasco,* 833 F.2d at 281. These principles may be summoned in any breach of contract case. Thus satisfying – at best – one of the McCarran-Ferguson factors, the Alabama tort of bad faith is not saved from preemption. When the *Dedeaux* Court reached an identical end to its McCarran-Ferguson analysis, the Mississippi tort of bad faith fell outside the savings clause. 481 U.S. at 51, 57, 107 S. Ct. at 1555, 1558. True, the state law at issue need not satisfy all three of the McCarran-Ferguson factors, *Ward,* 526 U.S. at 373-74, 119 S. Ct. at 1389, but the satisfaction of one factor will not save a state law from preemption where the common sense test is unmet.

Even if we did agree with the district court's method of analyzing the savings clause, post-*Ward* precedent in our circuit holds that ERISA preempts the Alabama tort of bad faith. *Butero v. Royal Maccabees Life Ins. Co.,* 174 F.3d 1207, 1215 (11th Cir. 1999). The decision in *Butero* is dispositive because "the law of this circuit is 'emphatic' that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision." *Cargill v.*

Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997). Thus, *Butero, Belasco,* and *Amos* remain good law.

III. CONCLUSION

The Alabama state law of bad faith relates to employee benefits, but does not regulate insurance. Walker's claim is therefore preempted by ERISA. 29 U.S.C. § 1144(b)(2)(A). Accordingly, we REVERSE the decision of the district court and REMAND for a decision consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHNNY E. WALKER,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	
v.	)	CV-00-AR-2253-S
	)	
PROVIDENT LIFE & ACCIDENT INSURANCE CO.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Feb. 6, 2001)

Life never provides a 100% guarantee of anything except for death and taxes. This is certainly true when considering whether *Ryan Hill v. Blue Cross Blue Shield of Alabama*, 117 F.Supp.2d 1209 (N.D. Ala.2000), was correctly decided.

By its objection to the motion of plaintiff, Johnny E. Walker ("Walker"), for leave to amend his complaint to add a claim of bad faith refusal to pay, defendant, Provident Life & Accident Insurance Co. ("Provident Life"), is asking this court to acknowledge that it was wrong in *Hill*. This court is not inclined to retreat from *Hill*, where this court explained its understanding of *UNUM Life Insurance Co. v. Ward*, 119 S.Ct. 1380 (1999). This court need not retreat unless it is instructed to do so by a higher court.

There is now in the Supreme Court of the United States a petition for *certiorari* that requests a review of the Fifth Circuit's opinion in *Corporate Health Insurance, Inc. v. Texas Department of Insurance*, 220 F.3d 641 (5th Cir.2000). This presents an opportunity for the Supreme Court to enlighten us all on the subject at hand. On January 8, 2001, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States on the reach of the "savings clause". If the Solicitor General accepts the Supreme Court's invitation, and if his brief is consistent with the brief *amicus curiae* that was filed in support of the Texas Department of Insurance in the Fifth Circuit by the Solicitor of Labor, the position of the United States will be consistent with this court's conclusion in *Hill* that ERISA does not preempt state laws if they regulate insurance and if they are aimed only at the insurance industry. The Solicitor of Labor, at page 22 of his *amicus* brief before the Fifth Circuit, described the Texas statute there under consideration as follows:

> [T]he HMO Act appears to be specifically tailored to the insurance industry and applies only in that context.

At that point, the Solicitor of Labor dropped the following footnote:

> The United States argued in *Ward* that *Pilot Life* does not in itself require preemption of a state law that regulates insurance **even if it provides a state law cause of action or remedy.**

(emphasis supplied).

In other words, the Solicitor General in *Ward* had already provided the answer of the United States to the big question. Now the question is whether that answer changes with administrations.

Consistent with *Hill* and with what three other judges of this court have held since *Hill*, a separate order granting plaintiff's motion for leave to amend with [sic] be entered.

DONE this 6th day of February, 2001.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12100-GG

(Filed Mar. 15, 2002)

JOHNNY E. WALKER,

Plaintiff-Appellee,

versus

PROVIDENT LIFE & ACCIDENT INSURANCE CO.

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: TJOFLAT, BIRCH, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested

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* Honorable Richard W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE